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ABSTRACT

The way that "open meeting laws" are working in the governance of U.S. higher education is discussed, based on a study of sunshine laws of 50 states and a survey of case law and attorneys' opinions. In-dept interviews were also conducted with individuals from six states identified as representing a range of openness. From most open to least open, the states were Florida, Montana, Minnesota, Iowa, Texas, and Pennsylvania. Information is provided on the purpose of sunshine laws, defining breadth of coverage of the law, defining a "meeting" covered by the law, exemptions, and rules for executive sessions. The atmosphere of college governance since the advent of sunshine laws is also considered. Benefits of openness are discussed, including public participation in decision making and reduction of some types of procedural problems. Nine costs of openness are shown to have negative effects on individual privacy and institutional operation. Twenty-three characteristics of openness are defined, and a chart indicates the characteristics of each of the 50 states. Additional information is provided on: criteria for determining which agencies are covered by sunshine laws, the number of people that constitute a meeting as defined by each state, and specific sanctions for violation of sunshine laws allowed by each state. (SW)

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THE COSTS AND BENEFITS OF OPENNESS:

SUNSHINE LAWS AND HIGHER EDUCATION

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September 1984

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Foreword

This report to the Association of Governing Boards (AGB) on how "open meeting laws" are working out in the governance of higher education in the 50 states of the United States of America is the culmination of field research, legal research, and a workshop convened by the AGB in September, 1984, at Wingspread, the Johnson Foundation's conference center in Racine, Wisconsin.

The field research was done by Sandra Braman, Administrative Fellow at the University of Minnesota's Hubert H. Humphrey Institute of Public Affairs, who is a specialist in information policy issues and a doctoral student at the University of Minnesota's School of Journalism and Mass Communication. She also pulled the laboring oar in drafting the paper.

An early conceptual contribution to the project was offered by Mitch Pearlstein, former Assistant to the President of the University of Minnesota, and now on the editorial staff of the St. Paul Pioneer Press & Dispatch. Mary Shallman, my Graduate Assistant during 1983-4 and now a graduate of both the Humphrey Institute and the University of Minnesota Law School, first collected and analyzed the sunshine laws of the 50 states. Judith McLaughlin of Harvard University contributed to the field research, particularly that conducted in Florida, Texas, and Iowa; her work with David Riesman on presidential searches has been enlightening. Clark Kerr's research with Marian Gade on the problems of leadership in higher education helped provide a context for the specific problems of openness we explored here. A preliminary report called "Sunshine Laws from the 50 States: A Spectrum" was sent to the 50 state attorneys general for their

comment. Their welcome replies, showing a lively interest in this research, have been incorporated in this paper.

We are grateful to the initiative and continuing interest of Tom Ingram, Vice President of the Association of Governing Boards, the financial help provided by AGB for this purposes by the Exxon Educational Foundation, and the Johnson Foundation's cooperation in hosting the September workshop.

Most of all, we are indebted to the many other persons (they must, in the nature of things, remain anonymous), who helped us through candid interviews and correspondence. We are not aware of any person, asked to assist in this research, who was unwilling to do so. The subject is often current and choice, and everybody is looking for answers. The intention of this paper, as part of the search for practical answers to real dilemmas, is to clarify the benefits and costs of openness.

Harlan Cleveland

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Introduction

This study has investigated the costs and benefits of openness for higher education. The procedure was first to examine the sunshine laws of all 50 states and construct a spectrum of comparative openness (detailed in Appendix I), to survey relevant case law and attorneys general opinions (summarized in Appendix II), and to conduct in-depth interviews with a cross-section of individuals from six states identified as representing the range of the spectrum of openness (from most open to least open, those states were Florida, Montana, Minnesota, Iowa, Texas, and Pennsylvania). Beginning with an introduction to sunshine laws themselves, the results of this study follow. They should be of interest beyond the realm of higher education, for they suggest implications for how information flow in society in general should be governed, refine our understanding of how the democratic process does, could, and should operate, and illuminate the balancing of interests that must always take place--in protecting speech of one kind, that of another may be restricted.

I. The Public Interest

The mandate to serve the public interest is not limited to its well-known imposition upon the mass media. The same criterion for judgment is found implicitly or explicitly in most state open meeting laws. In Tennessee, for example--a state in which closed meetings are not allowed under any circumstances--the strictness of the law is defended as just "in the absence of proof that opening all meetings was detrimental to the public interest." In other states, a determination of the public interest is the final criterion to be used

in deciding whether or not closure of a meeting in accordance with a specified exemption is appropriate.

But what is the "public interest? To the mass media, it lies in the public's right to know—to receive information about all steps of public decisionmaking. For educational administrators, it lies in allowing public officials, chosen in accordance with the democratic process, freedom to make decisions according to procedures they determine best meet the operating needs of their institutions. Discussion aimed at resolving the conflict in these viewpoints is often muddy; repeated assertions of a clash between absolute rights obscure the actual, complementary elements of the public interest all wish to serve.

In the application of sunshine laws, those elements are three:

(1) The public's right to know derives from the same values of open and robust exposure of ideas that underpin the First Amendment, and is therefore fundamental to the operations of the democratic process. Free speech is meaningless unless the public is free to gather information about which to speak. And informed decision-making in electing public officials is impossible unless the public is knowledgeable about the actions of those officials and about the institutions which they are to govern.

(2) The individual need for privacy is protected by laws that vary widely from state to state. With the encroachments of modern communication technologies upon the private domain, however, awareness of the importance of the right to privacy is growing everywhere; the trend is towards strengthening existing laws and establishing privacy

laws where before there had been none. The right to individual privacy is acknowledged almost universally by sunshine laws--the most common exception for closed meetings is precisely to protect that right.

(3) The public institution's mandate to fulfill its functions requires freedom to operate effectively and efficiently. It is not in the public interest when institutions designed to serve the public fail to accomplish their goals, such as providing higher education to the community through an excess of openness. The mandate to fulfill institutional functions implies a need for protection of the operating procedures--ways of making decisions, communicating internally, and interfacing with the public--that are deemed necessary.

In the following discussion of formulations of open meeting laws, their interpretation for particular situations, and the problems that those involved run into in their application, one can watch the focus moving from one of these elements of the public interest to another.

We do not believe that any one or even two of these three elements of the public interest can or should be regarded as overriding in all cases. As with other good principles the only general answer is "It all depends"; ethics is the art of combining them, case-by-case, in commonsense outcomes. Educational governing board members and academic executives should not regard themselves as above all responsibility for defending the public institution's right to discharge its mandate; individuals cannot claim an absolute right of privacy; the media, self-appointed surrogates for the general public, should not posture as defenders of an overriding public right

to know. All three of these participants in this complex choreography—and others, such as judges, who are brought in to consult and to adjudicate—should regard themselves as responsible for seeking outcomes that take seriously into account the whole of the public interest, not trying to decide which aspect of the public interest must always be a "right."

Our account of the costs and benefits of openness concludes with suggestions of some guidelines for balancing the three elements when operating higher education institutions in the sunshine.

II. Sunshine Laws

Openness is not a concept inherited from the common law tradition. It appeared around the turn of the century, first in an 1898 Utah statute, and soon thereafter in 1905, in Florida. A remake of the latter in 1954 began a wave of legislation around the country—by 1959, 20 states had sunshine laws as part of the general attempt to eliminate the effects of secret actions upon public decision-making. Most sunshine laws, however, developed during a second burst of law-making during the post-Watergate 1970s out of revulsion (their purpose clauses are full of resentment and fury) against deception, corruption and cover-up in high places. By 1974, 46 states had sunshine laws, and by 1977 meetings of public bodies were required to be open in all 50 states. The federal statute followed those of the states (and England itself finally passed one as well). As they have done before in 200 years of history, the American people reasserted through their elected representatives their right to hold the reins of government in their own democratic hands.

Sunshine laws were originally derived from the First Amendment, as is clear in the purpose clause cast by California and borrowed by many other states:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This emphasis on a right to information comes from an interpretation of how the democratic process works:

[P]ublic agencies exist to aid in the conduct of the people's business and the proceedings of public agencies [should] be conducted openly so that the public may remain informed. . . . it is the intent of the law that actions of state agencies be taken openly and that their deliberations be conducted openly.

~~Kansas~~ points out that:

A representative government is dependent upon an informed electorate.

The laws themselves vary in detail from state to state (a detailed breakdown may be found in Appendix I). But all address the following points.

Purpose. Many states, particularly those whose laws were shaped during the 1970s, include provisions outlining their intent. In others, it has taken judicial or attorney general interpretation to make their purpose explicit. Everywhere, the thrust is towards

liberal interpretation in general and narrow construction of any particular exceptions or exemptions which may be carved out of the law.

The right of the public to attend meetings is distinguished from the right to participate in meetings; in many states, such as Arizona, it is understood that the public has a right to voice its opinion when decisions are being made on its behalf. The public also seems to differentiate between these two rights: In Hawaii, for example, when every kind of meeting was opened up almost no one came, leading one administrator of the University of Hawaii to comment that, "Students don't want so much to participate in the managing of the university, but to watch it being managed through an open door."

Coverage. The different methods that are used to define breadth of coverage--state agencies and bodies subject to the law--include: (a) those that receive or spend public monies, (b) those that are created by law, (c) those that carry out a general public function, (d) those that carry out policy- or rule-making functions for the public, and (e) enumeration. Almost every public university and college is accountable to sunshine procedures by these criteria, and as is pointed out in Clark Kerr's report for the AGB on presidential leadership, "Presidents Make a Difference," that is 50% of the campuses and 80% of the students in the country.

Higher education institutions relate to the state in four different ways: (a) Autonomous institutions created by a state constitution are not necessarily subject to other laws of the state. Only in Colorado and California, however, have regents of such state

universities been adjudged to be beyond the scope of the sunshine laws. The University of Virginia was in the past excluded from coverage, but is no longer. In Massachusetts, regents are subject to the law but are allowed additional subject areas for which meetings may be closed, and in Wisconsin notice requirements are not applied as strictly to universities as they are to other institutions. Other autonomous state universities have chosen to create their own open meeting laws in alignment with state laws, even though they need not.

(b) State college and university systems that are agencies of the state are clearly subject to state sunshine laws. (c) Private institutions that receive some public funds, such as Cornell University (which has four statutory colleges on its campus) and Syracuse (which, though private, runs a public School of Forestry), have been deemed to be covered by state sunshine laws by virtue of the fact that they receive and expend public monies. (d) Private institutions that receive no public funds are not by law subject to sunshine restrictions. However, it has been pointed out that what affects the public sector today will affect the private sector tomorrow.

Depth of coverage—how deeply within the hierarchy of an organization sunshine laws apply—is rarely adequately covered within the law itself; more often, courts and attorneys general determine application case by case. At one extreme, such as in the relatively closed state of Pennsylvania (see Appendix I), only meetings of the Board of Regents must be open; at the other extreme, as in Florida, committee, sub-committee, and/or advisory board meetings must be open

as well. Nevada goes so far as to require the Board of Regents to establish and monitor open meeting laws for university student groups. The increasing decentralization of university administrations since the 1960s increases the importance of this matter to the governance of educational institutions.

Definition of meeting. In too many states the exact definition of a meeting that is covered by the law is also left vague, leading to six areas of contention:

(a) How many people constitutes a meeting? Ten states offer no numerical definition at all; in others the answers range from two or more people to a quorum or majority. The lower figures indicate an intent to chill all communication among those in power without public visibility. Where the higher figure is applied, the assumption is that the public is in no danger unless action is actually being taken.

(b) What kind of discourse comprises the content of a public meeting? In a few states--such as Pennsylvania, where only a \$10 fine is levied for violation of its sunshine law--only the taking of votes must occur in the open. Most others include discussion as well. But there are many kinds of discussion, including that upon specific proposals before the decision-making body, on general topics for which that body has responsibility, about things in general, for the purposes of self-education, for self-evaluation, for brainstorming, and for fact-finding.

Many states are afraid of establishing a situation in which only rubber-stamping of decisions is done in public. A Louisiana attorney general's opinion noted, for example, "[The] purpose of the Open

Meeting Law is to prevent private meetings of public bodies in which only the 'end result' is observed by public in open meetings, with all important discussion and arguments having taken place behind closed doors." Coming from the opposite direction, a Wisconsin attorney general's opinion states that, "Discussions or brainstorming of a tentative nature preliminary to focusing on a specific outcome and which are not intended to evade the law are not covered by the law. The Texas statute offers statutory language addressing this point when it defines covered deliberation as "a verbal exchange . . . attempting to arrive at a decision on any public business."

Other states define covered discussion still more broadly. Oklahoma points out that the purpose of the law is to "encourage and facilitate an informed citizenry's understanding of the governmental process and governmental problems" [emphasis added], Iowa declares that its purpose is to let citizens understand the rationale behind public policy, Virginia seeks an "increased awareness" on the part of its citizens and Washington specifies that the intent is to allow the public "to observe all steps in the making of governmental decisions." In Maryland, coverage of advisory boards specifically means that study, evaluation, and the making of recommendations are included. A number of states rely upon the interpretation offered by American Law Reports 3d:

[O]nly by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, could an open meeting regulation frustrate . . . evasive devices.

Once the types of discourse that are to be covered by a sunshine law have been defined, there is the additional problem of distinguishing covered discourse from that which is not--and the two are often mixed.

(c) Are chance, informal, or social gatherings covered? Many states take a pragmatic approach and specifically exclude those types of meetings which are not convened for the purpose of undertaking public action, as in Mississippi, where the open meeting law "shall not apply to chance meetings or social gatherings of members of a public body." In other states, however, the fear of abuse should any meetings among those in power be allowed is so great that even social and informal meetings "held in anticipation of or in conjunction with a regular or special meeting," such as a pre-meeting dinner party, are forbidden. The dangers of such abuse were commented upon by the Attorney General's office in Wyoming, which noted that "private pre-meetings at which no vote is taken but the intent of the decision-makers becomes apparent" was that state's biggest sunshine problem. In those states in which meetings of two or more are covered, any interaction between two people who are involved with the same covered body is forbidden, whether at the drinking fountain or over the telephone.

(d) Are staff meetings covered? In most states meetings of public officials with their own staffs are not covered by sunshine laws, though staff reports to a convened body would be. This issue has caused relatively little trouble, though occasionally the question of whether or not a meeting was actually a "staff" meeting has arisen.

Connecticut and North Carolina, for example, expressly excludes staff meetings.

(e) Are faculty meetings covered? In many states this question is not specifically addressed by the law, nor has it been specifically adjudicated. Where the question has been dealt with, the increasing tendency of faculties to perceive of themselves as employees rather than management has led to a determination that faculty meetings are in essence staff meetings. It was decided in a 1983 Florida case, Wood v Marston, that when a faculty committee has decision-making authority (in that case the faculty of the University of Florida School of Law made recommendations during a dean search process), openness is then required. During discussions in North Carolina during the late 1970s held as part of an open meetings law rewrite process, the media made it clear that they were not interested in covering faculty meetings, and there is now a state-wide understanding that such meetings need not be conducted in the open.

(f) Are electronic meetings covered? More and more states (Virginia just added this provision during its 1984 session) are specifically include electronic meetings, via serial or conference telephone calls. In many states, a meeting is now defined as a convening of a "quorum, corporal or electronic." The attorney general's office in Illinois has pointed out that in that state, electronic meetings actually provide more opportunities for public involvement than do corporal meetings; often agencies will meet via a conference call that joins three cities, in each of which the public then has access to the meeting. A few states specifically describe

the circumstances under which electronic meetings may be held, and North Carolina permits an agency to charge listeners up to \$25 apiece to cover the cost of additional equipment required to meet this requirement. New Mexico is unusual in its refusal to permit public meetings via the electronic media; its position is based on the argument that such meetings are too difficult to open to the public.

Exemptions. As Kaplowitz pointed out in his 1978 study for the AGB, "The most fundamental question involved in governance under Open Meeting laws is the determination of those topics that warrant a board's moving from public into Executive session." While the general construction of sunshine laws emphasizes one element of the public interest--the public's right to know--it is in the areas identified as exempt from openness requirements that the other two elements of the public interest are acknowledged. Thus, as is shown below, the individual need for privacy and the institutional mandate to effectively fulfill its function receive some protection in the permission to conduct certain activities in private.

The rationale behind carving exemptions out of the open meeting law has been expressed in the New Mexico statute, which states that its purpose is "not to unduly burden the appropriate exercise of governmental decision-making and ability to act." A similar sentiment can be found in the Wisconsin statute, which seeks openness for "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Proponents of such exemptions claim that it is impossible to prevent the occurrence of certain types of discussion in

confidence; many seek additional exemptions. Critics assert that it ain't necessarily so; Gillmor and Barron's classic media law textbook calls the use of executive sessions an "evasive action" on the part of an institution. The Governor of Florida has called for a review of exemptions to that state's law, fearing that the increasing number of exclusions had weakened the law's effectiveness. In a statement to the House of Representatives of that state, the Speaker implied that such multiplication of exemptions was not due entirely to chance, nor to innocence:

Fifteen years ago this state began an unprecedented experiment in open governance. . . . What a tragedy it would be if we were now to permit that experiment to fail. Florida's commitment to government in the sunshine has been threatened by the passage of far too many exceptions, many of them buried in large bills which have escaped the attention of most legislators.

Four types of argument are used to defend discussion of some types of business confidentially—the first stems from recognition of the individual right of privacy, while the other three derive from the institutional mandate to function effectively.

(a) Certain types of discussion can cause damage to an individual if held in public. This is the argument used to exempt discussions about individuals. Those exemptions can either be narrow (only those discussions that might directly impinge upon an individual's privacy or cause damage to his or her character is protected), or broad (any discussion regarding individual employment or other individual

personnel matters is protected). (There is no case at all for exempting discussions about personnel policy in general.)

(b) Some business simply cannot meaningfully be conducted in public. Examples of exemptions established using this argument would include the formulation of strategy for negotiations with a collective bargaining unit, the negotiations themselves, and consultations between a board and its attorney regarding strategy for pending or current litigation.

(c) It does not best serve the public's interest to discuss some matters in the public. It is argued that deliberating upon real estate purchases or sales and many types of investment decisions in public can skew the market with unfavorable financial consequences for the institution and its public.

(d) Some types of discussion can cause damage to the institution if held in public. Discussion of the results of a presidential or governing board evaluation would fall into this category. Many argue that open presidential searches also damage institutions by causing a decline in the quality of leadership.

The above-mentioned types of exemptions are pertinent to higher education and thus were considered in construction of the openness spectrum for the purposes of this paper (see Appendix I). Other types of exemptions range from discussions of security matters to criminal investigations to parole deliberations to medical discussions. (The exemptions of some states provide amusing insight into a state's psychology--only Texas exempts discussion of mineral and oil matters, while West Virginia permits confidential discussion regarding conduct

of war!)

Rules for Executive Sessions. Almost invariably executive sessions are limited in scope to discussion of the particular topics for which they have been closed, and closure occurs only after voting in open session upon the appropriateness of closure in a particular case according to a specific exemption. In most states a majority vote only is required to close a session in accord with exemption rules. Some states, however, require a 2/3 vote. And in Oklahoma, though state law demands a majority vote the constitution of the Board of Regents of Oklahoma Colleges is far stricter, requiring a unanimous vote before a meeting can be closed. In some states notice requirements and thus a time lapse is required between the decision to close a session and its actual closure. In others, a time limit on the order of 30 minutes is established for executive sessions. Often minutes of executive sessions are required to note time, attendance, and topic(s) discussed. In cases where motions are made and votes taken in closed session, these too must be noted, with a vote by vote listing (New Hampshire requires that such votes be disclosed in public within 72 hours unless that would render the action taken ineffective or cause damage to a person or the institution). Some states require complete transcripts to be made of meetings in executive session, which usually may remain confidential unless needed as evidence in litigation or until there is no longer need to keep content of those minutes confidential; Oregon and Vermont, for example, require that minutes must give a "true reflection of the matters discussed" and the views of participants. In Oregon also, closed meetings are open to

the special class of the news media, with the proviso that confidential material not be reported. Missouri stresses that all members of the public must be excluded from executive sessions, while some other states permit those who are providing information or being considered for office to be present at executive sessions.

Sanctions. Four types of sanctions are used in various combinations by the states should their sunshine laws be violated. In some cases the level of imposition of sanctions increases with repeated violations, which may be levied against either individuals (in which case a showing that a particular individual resisted violating the sunshine law may protect him or her from sanctions taken against other members of a covered group) or against the body or agency as a whole. All citizens of a state have standing in almost every case; in many places, the attorney general's office is also free to bring action. Action must be brought within a specified time period, generally under 120 days, and some states require a showing of intent to violate the law as well as proof of the actual act.

(a) Voiding of the action. Declaring an action taken in contravention of the sunshine law null and void is the measure most commonly found. In some states, an illegal action can be made legal simply by re-taking a vote in public. In most, the entire process must begin again. However, the voiding of actions is not always simply accomplished and the difficulty of imposing this sanction often requires a weighing of a challenge to an action altogether. Many states permit nullification of an action to lie at the court's discretion. A few states will nullify any but financial decisions

made in contravention of the law.

(b) Equitable relief. Equitable relief remedies, often including a writ of mandamus and/or injunctions, are used by four-fifths of the states.

(c) Civil penalties. About a quarter of the states impose civil fines, often nominal, upon groups that sidestep open meeting requirements. In some states, a public official may be removed from office for repeated violations.

(d) Criminal penalties. About two-fifths of the states can take criminal action against offenders, with sentences that include fines and/or jail sentences and often increasing in weight with repeated offenses.

Miscellaneous. Sunshine laws almost always include detailed notice provisions, and occasionally describe requirements for locations in which public meetings are to be held. Provisions for minutes of open meetings are also almost universal, while a few states require distribution of agendas beforehand.

Changes in Sunshine Laws. Almost all of the state sunshine laws have been amended since they were first passed. Most amendments have served to broaden the coverage and increase the depth of application of sunshine laws. By the 1980s, the general shape of the laws has been established, and amendments attend to finer levels of detail. Recent amendments have added a few exemptions, made more definite the procedure by which meetings can be closed, and in general strengthened the law.

In the past few years, Arizona has expanded its coverage to

additional governmental bodies, improved its enforcement provisions and clarified the circumstances under which closed sessions are allowed; Arkansas has specified that only personal matters that invade privacy are to be exempted; California strengthened its purpose statement, emphasizing the sovereignty of the people and their right to information; Florida broadened its definition of covered bodies; Hawaii extended sunshine requirements to subdivisions of covered entities, added a clause that permits public participation in public meetings, and restricted the legal discussion which is exempt from openness to that concerning actual or proposed litigation; Iowa exempted discussions of labor strategy; Minnesota added a requirement that printed materials related to agenda items be distributed before an open meeting; Nebraska added a public interest criterion for closing; Nevada added a provision to void actions taken in violation of its sunshine law and extended its rules to student government; New Hampshire strengthened the right of its citizens to review notes of closed meetings and added a requirement that a vote to close a meeting be taken by roll call; New Mexico decided to allow employee evaluations to be conducted in private upon the employee's request and extended coverage to additional governmental bodies; New York exempted discussions about securities; North Carolina exempted discussions that investigate election frauds; Ohio extended the type of discourse that must be conducted in an open meeting to include deliberation as well as the taking of final action; Oregon demanded greater specificity of topics when closing a meeting; Rhode Island added detail to the procedure by which meetings could be closed and added workshop

meetings to those which must be held in the open; South Carolina exempted discussions of law enforcement agencies; and Virginia covered electronic as well as corporal meetings.

Amendments that have been recently proposed but were not successful include Florida's attempt to protect the college and university presidential search process by a specific exemption, and a repeated proposal in that state to review all existing exemptions and establish a standing committee to centralize all proposals for exemptions to the open meeting law in the future; Minnesota's attempt to extend the personnel exemption, and add a purpose clause; the movement in New York to strengthen the penalties for violation of the sunshine law and to require minutes detailed enough that the right to private deliberations on specific matters could not be abused; the attempt in Texas to specifically protect the presidential search process (similar to the proposed amendment in Florida); and Vermont's attempt to add a numeric definition of a meeting (a quorum), add the possibility of voiding action taken in contravention of the law, cover electronic meetings, specify the nature of required meeting notice, and include a provision for the voicing of public opinion during an open meeting.

III. The Sunshine Environment

The Ecology. It is difficult to separate the effects of sunshine laws from those of other events, laws, and trends; open meeting laws are synergistic with other influences in the educational environment. Some pertinent factors with which sunshine laws interact include the following.

(a) Most colleges and universities must deal with budgets that do not keep pace with their needs, or with inflation, making decision-making more difficult in general. This raises the systemic level of campus tension has risen and increases the number of potential adversary relationships between departments and programs who are competing for limited funds.

(b) Colleges and universities have not escaped the rising level of litigiousness of American society at large; as a result, the sunshine law is viewed by some as yet another opportunity for challenging administrators' actions. The fear of "imminent litigation" sends clouds between sunshine and daily activity, having a chilling effect on discussion and action by university administrators.

(c) State governments are paying more attention to higher education than they used to. Budgets are now often examined line by line. Judicial review of university actions--for many years considered a usurpation of university rights with the potential for infringement upon academic freedom--has increased. Complicated administrative systems offer numerous commissions the opportunity to scrutinize the activities of higher education. Governing boards and presidents thus feel less free to act independently than they have in the past; the balance of power is shifting.

(d) A rising demand for widespread participation in college and university governance since the 1960s has led to a decentralization of power throughout most academic communities and multiplied the ways through which the public may be involved in decision-making. Students, faculty, and staff now are represented on most governing

committees in many states. This can go to extremes: one presidential search committee in Montana thought it had gone far enough in ensuring that every concerned constituency had a voice in the search when it included "cheerleaders and groundskeepers" among others on its committee—but then the extension agents felt that they needed a presence in the search as well. Some argue that, "If you have a rainbow committee, you don't need sunshine, too." To some degree, this demand for participation indicates a lack of trust not just in the institutions in which participation is sought, but also in the processes of democracy themselves; if the procedure by which representatives of the people are chosen were considered reliable, there would not be such a powerfully expressed need on the part of others to get involved with what is happening--the representative would actually be perceived as such and thus trusted to act on behalf of his or her constituency. Participation in public discussion may or may not occur in conjunction with sunshine laws.

(e) Open meeting laws amplify the horizontalization of society. Universities, along with hospitals, exemplify the way in which decisions are more and more formed by horizontal communication, rather than flowing down vertically from above. Consultative decision-making and an emphasis on committee work spreads decision-making power throughout the university community.

(f) As the Attorney General of the State of Oregon has commented, "Openness in government in any state cannot fairly be evaluated without examining its laws governing access to public records as well as its laws governing access to meetings." Open meeting laws are

inextricably intertwined with open records laws; in several states they are one and the same law, under the heading "freedom of information."

Though the two types of laws would seemingly work hand-in-hand, this is not always the case. At times, the attempt to work within the constraints of one brings a governing body into conflict with restrictions of the other--details of confidential discussion permitted by a sunshine law can be forced into the open under open records provisions. Conversely, information that should be in the open according to a sunshine law may be protected by open records exclusions. In one instance, for example, an applicant for dean in a wide-open search process was at the time an employee of the same school, the University of Florida, and thus had protection under open records for her employee records--a right which she waived, preventing the conflict from achieving a judicial resolution.

(g) Open meeting laws interact with privacy laws. In a state like Montana, which has a strong constitutional provision protecting privacy, the public right to know butts the right to individual privacy head to head. New York's new privacy act is considered to be a key factor in future interpretations of its sunshine law, and in Minnesota the Data Privacy Act is pertinent.

(h) Characteristics of the press, the constituency most interested in sunshine laws, differ from state to state, and time to time. It's the difference between Queensbury rules and brass knuckles. In Montana, for example, the press has been characterized as being extremely proud of its investigative reputation; in a state

where everyone knows everyone and combativeness is the operating mode, "People use the press to get at each other," and, "If somebody's ox is being gored they go to the press and give them a story." Sunshine law challenges appear often and appointed and elected officials are treated alike. In Texas, on the other hand, sufficient funds for academia and a general mood of optimism contribute to an interest in getting the job done rather than finding out who did what; as a result, the press overall has been what one university administrator called "more gentlemanly," and appointed officials are treated more delicately than those who have chosen to enter the public eye through the election process. In Pennsylvania, university administrators assume it is the "maturity" of the press, their understanding of what damage an open search process can lead to, that prevents journalists from challenging the state's relatively closed procedures (while journalists say that attendance at university meetings just isn't interesting).

The press everywhere is more absorbed in the application of sunshine laws to personnel matters than to the conduct of financial affairs, presumably because "names make news." Investment decisions, for example, would seem to be at least as story-worthy as personalities, but apparently this is not the case. The press seeks "gossip," with "horse race value," in choosing which matters to pursue.

It may be worth noting that the higher education beat is often assigned to younger and less experienced reporters with a relatively unsophisticated perspective on complex administrative, political, and

financial affairs. One chancellor of a state-wide university system commented, "I feel as if I spend most of my life educating cub reporters." Such reporters may aggressively press open meeting demands out of their ambition to make a name for themselves. In Montana a reporter from a university newspaper who is already a stringer for UPI currently routinely attempts to force any meeting held in executive session into the open.

Finally, the commitment of journalists to openness is sometimes inconsistently applied, leading to the perception that the media hold a double standard. In Iowa, for example, the press clamored for openness in the presidential search process, but the prestigious University of Iowa journalism school resisted disclosing the names of its own candidates for the school-owned and -run television and radio stations. The same editor of a newspaper that seeks disclosure of the contents of a university president's evaluation, as in the recently-decided Missoulain case, receives his or her own evaluation confidentially. Pursuit of openness by the press can also be sporadic--since the success of a newspaper in obtaining the release of several hundred names of candidates in an energetic search for a new president for Texas A&M, for example, over a dozen presidential searches have been conducted in that state without any request for disclosure at all.

The press, like everyone else, has political interests at stake when it deals with open meeting laws. And politicians have a particular interest in the shape of the journalism product. In a recent Montana case, this seemed to be the governing factor. The

Missoulian challenged the procedure used to select a new president for the University of Montana on openness grounds, but within the 30-day period it took for the newspaper to attempt to void the decision to hire that it alleged was illegal, the new president had already proven enormously successful. When pressed to name an "essential party"—the new president—in order for the suit to continue, the newspaper chose instead to drop its action, leading to a speculation that the paper decided a vendetta against an extremely popular university president would not be politically expedient.

The Atmosphere. Several generalizations may be made about the atmosphere of university governance since the advent of sunshine laws.

(a) On the part of universities:

(i) Openness dominates the mood of university governance.

Across the board, university administrators almost uniformly perceive that they are operating within an environment of extreme openness. (Only one administrator in Pennsylvania characterized the level of openness in that state as "fairly meek," while all others interviewed described it as "extremely open.") In critiquing our 50-state sunshine spectrum, comments by attorneys general who disagreed with our evaluations have uniformly been in the direction of making their states appear more open.

(ii) Openness is here to stay. Proponents and critics agree that the relatively new condition of openness is a permanent one; many expect to see openness provisions applied ever more widely. Exceptions to this viewpoint may be found among the media, where some fear that the Reagan administration trend towards restricted access to

governmental information, restricted free speech for governmental employees, and increased numbers of Freedom of Information Act exclusions may also eventually play out in the realm of open meetings.

(iii) The concept of openness is accepted. Even those who most oppose the operation of government in the sunshine concede that the concept makes sense. Despite reluctance on the part of regents in Iowa to establish an open presidential search process, for example, our interviewees gave the impression that they still believe that the public's business should be conducted in public. In Pennsylvania, universities feel they gain from the involvement of those other than administrators through openness procedures. Sometimes the adoption of such rules by public institutions comes before the law requires it, as in Pennsylvania and Minnesota. "Many schools," noted one observer familiar with institutions across the state of Pennsylvania, "found the imposition of the sunshine law helpful because it made them set guidelines."

(iv) The question of what openness means is never completely answered. With the initiation of almost every presidential search or upcropping of a contentious situation, the issue of where the limits of openness are is raised again. In the words of one university administrator from Texas whose commitment to openness seems tenuous: "I believe in the people's right to know. I'm just not sure how much they should know, or when."

(b) On the part of the press:

In state after state, universities are perceived as the worst offenders among state agencies regarding compliance with state

sunshine laws. It has been said that in Texas, where the University of Texas at Austin by its own admission operates as "circumspectly" as possible, the enactment of the state sunshine law was motivated largely by media frustration with the University of Texas Board of Regents. In North Carolina an attempt to apply the sunshine law to the university in the early 1970s forced a complete rewriting of the law.

Higher education administrators argue that open meetings laws were constructed with other types of agencies in mind, and that it is difficult as a result to apply sunshine provisions to the kinds of information and decision-making procedures found within the academic setting. As a result, finding accommodation within the law for the organizational need to protect certain processes in order to function at all is more difficult for educational institutions. In addition, it is argued that the needs of academic freedom should to some degree outweigh the public's right to know details of college and university decision-making, and that the leadership needs of academia--and thus the process used to find those leaders--are unique. The academic freedom argument, for example, was one prong of the unsuccessful attempt in Wood v. Marston by the faculty of the University of Florida School of Law to close its dean search process.

Critics believe that the academic freedom argument is overstated, or completely misplaced; some say that a genuine commitment to true academic freedom would actually go the other way and require all discussion to be in the open. There is also a sense that the ivory tower mentality leads to a misperception of characteristics shared, or not shared, with other public agencies, and it is suggested that the

generally private people attracted to academic life tend to define the requirements of privacy more broadly than does the general populace. In general, the press is not convinced by any of the lines of argument by which academia attempts to distinguish itself from other bodies covered by state sunshine laws. "It is especially upsetting when universities deviate from the law, because as institutions they are so well respected," noted one media attorney.

Litigation Applying Sunshine Laws to Higher Education.

Sunshine laws seem to be particularly problematic in their application to higher education, judging by the relative number of attorneys general opinions and judicial decisions dealing with this matter. A review of the cases and decisions summarized in Appendix II shows that most challenges stem from dissatisfaction by those who are penalized by decisions made in closed meetings--often faculty members who lose their positions. Boards of Regents frequently attempt to conduct their operations in secret, but almost invariably lose when there is a battle over private meetings. Very often challenges arise to test the depth of coverage of sunshine laws within an organization; those decisions usually go in the direction of liberal construction and thus force committees, advisory boards, and so on open.

IV. The Benefits of Openness.

The positive effects of the application of sunshine provisions to the governance of higher education are somewhat abstract and diffuse. In general, it is that element of the public interest that is favored in the general construction of the laws--the public's right to know--that is best served.

The extent to which claimed benefits are actual is difficult to measure. Despite direct representation on so many governing committees, many faculty, students, and staff feel they have no voice in how decisions are made—while the absenteeism of those representatives and lack of involvement in public meetings belies the interest at the root of their own arguments for participation. (It is, after all, hard work to try to understand the details of administrative matters such as budgets.) Despite open records and open meeting laws, there is still a sense that business is conducted in secret; sunshine laws don't seem to mitigate the public mistrust of institutions. In the words of one student newspaper editor, "They [university administrators] always give us the run-around. They feel they don't have to tell us anything." This, of course, is no new phenomenon, but the permanent condition of tension between student papers and university administrators (one of the co-authors had exactly the same experience four decades ago). Still, the following benefits of openness can be observed.

Public Participation in Decision Making. There is more public involvement in and knowledge about decision-making by public officials, which has two effects: First, it is believed that the atmosphere of shared governance creates increased confidence in and acceptance of the governing process. Second, more, and more varied input into decision-making, generates an increase in the quantity, if not the quality, of concepts in the marketplace of ideas.

Protection against Corrupt Decision Making. Open meetings are thought to protect against fraudulent, mistaken, or casual

decision-making, protect officials from unfounded rumors, and, proponents say, increase the accuracy of fact-finding. They increase the accountability of public officials, and greater preparedness on the part of those who are reluctant to appear shoddy in their work in the public eye.

Reduction of Some Types of Procedural Problems. The institution of open meetings removes the potential of the use of a kind of procedural objection to a substantive issue. When an issue is raised by one side, the other can't argue that it should be discussed in a more open process--the process is already open.

Consultative Administration. Under sunshine, colleges and universities are finding that they have developed a more consultative approach to administration--while the range of constituencies with which a university is concerned need not have a voice in many types of decision-making by law, administrations find that consultation with those constituencies produces better decisions and more effective and efficient administrations. Consultation allows decision-makers to have a better sense of how constituents will react to an action, and the same constituents have a better understanding of the rationale behind decisions. While consultation makes the decision-making process more cumbersome, it may reduce the need for costly litigation later. "Students and faculty may not like our decisions any more," comments one Pennsylvania administrator, "But at least they know why we make them." "Texas has changed a lot [since the imposition of the open meeting law]," noted an administrator from that state. "We have a lot more faculty input into what we do now."

Educational Value. Openness is a persuasive educational tool to use in developing a state-wide public that is sensitivity to the needs and attributes of higher education. It can be a critical aspect of university/public relations.

V. The Costs of Openness

While the benefits of openness seem to accrue to the public's right to know, the costs of openness can be understood in terms of the damage caused to the other two elements of the public interest—individual privacy and institutional operation. Those costs include constraints upon the nature of discourse, alterations to the decision-making process, concrete administrative costs, specific procedural problems (such as with the presidential search process, evaluations of presidents and governing boards, and accreditation procedures), encouragement of mediocrity, and creation of an atmosphere in which the law itself is brought to disrepute. The costs of openness tend to be far more focused and therefore more visible than are the benefits, as Ann H. Franke of the AAUP has perceptively pointed out.

Effects upon the Nature of Discourse. The effects of openness upon the nature of discourse are the most far-reaching of all, for they create the very situation in which other costs and benefits arise. These changes in the nature of discourse are difficult to discern, and have been long discussed (witness the long-standing debate about the consequences of inserting cameras into the legislative and judicial environments which has by dint of philosophical argument rather than by analysis gone in favor of

openness). Henry H. Perritt, Jr., and James A. Wilkinson point out that discourse in labor relations, which has been studied much more rigorously than that in government, can be divided into four subprocesses--distributive bargaining, integrative bargaining, attitudinal structuring, and inter-organizational bargaining--and that each is less effective if it must occur in the open.

The Administrative Conference of the US has found the same thing in the operations of the federal government; it noted that the sunshine law reduces collegiality in agency decision-making, thus altering the nature of decision-making away from that sought in the very establishment of many government agencies. The ideal of collegial decision-making was described by the First Hoover Commission's Committee on Independent Regulatory Commissions:

"At its best each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience."

A comparison of discourse among members of college and university governing boards and committees before and after implementation of sunshine provisions has revealed the following effects on collegial decision-making and the nature of discourse as perceived by members of those boards and committees, staffs of those institutions, and observers of the educational scene.

First, there is a loss of candor. There is universal sentiment that discussion by a decision-making body in the public eye will not

be as honest as that held behind closed doors. Members of the group may want to present a united front to their constituents; may prefer not to criticize or appear to undermine members of the group or its leadership in front of others; may not want to expose weaknesses of programs or individuals to third parties less sensitive to nuances and complexities of situations involved or to day-in, day-out administrative needs; may prefer to hide personal positions on specific matters from third parties; may not want to present tentative or unpopular solutions to problems, or to hide personal ignorance; may not want to present pertinent information of a kind that could have political, economic, or social consequences if revealed in public; may not want to speak out against a present or future boss or colleague; and tend to restrict creative problem-solving or speculation ("what if?" discussions) for fear that unusual ideas or subtle perceptions or predictions offered as stimulation may be misinterpreted. "Though we always hope for more honest discussion," says one Iowa administrator, "we have to live with the realities."

Second, the constraints upon candor lead to a loss of freedom of speech among decision-makers. In the very attempt to create greater freedom of speech between citizens and their representatives, free speech between and among those democratically-chosen representatives is curtailed. There is less discussion and less sharing of varying points of view. (A First Amendment defense has actually been raised in several court cases to defend closure of meetings, but has consistently failed to prevail. The courts have felt that the public's right to know outweighs any damage argued by defendants.

They distinguish between actual prior restraint upon speech--which does not occur in such cases--and predicted consequences of speech that may be perceived as negative to pursuit of the interests of the speakers.)

Third, discourse becomes simplified. Because intricate details of a problem under discussion may be missed or misinterpreted by a listening audience that is relatively unfamiliar with the topic, the important but subtle details of many issues never get aired. Complex discussions become distorted as they are transmitted through the mass media or word of mouth, at times creating ill-will where the target is made of straw, and problems where none exist. "Students often lack a sense of proportion and get distracted from the central issue," complains a Pennsylvania trustee. The result of strict adherence to procedure is to paint matters filled with shades of gray in black and white, eliminating the creative complexity of discourse that might have lead to the most satisfactory solutions. As Arthur Simon notes in his examination of the effects of sunshine laws on higher education, the openness "limit[s] behavioral standards of participants by lowering their decisional norms to the community's level of prevailing political sentiment." Boiling a matter down to two sides destroys its substance--most have five or six at least.

Fourth, discourse becomes trivialized. Oversimplification of complex issues or avoidance of difficult topics often means that the most important matters never get discussed at all. Instead, discussion in open meetings will center on relatively easily resolved but not very important trivial matters.

The net effect of the impact of openness upon discourse is to reduce the quantity and quality of information used in decision-making. The roles of decision-makers have also been changed, for to function in a collegial manner a board or committee must be free to participate in open discourse together. The result in some situations was described by a trustee from Iowa: "We can't go into executive session to discuss an issue of great sensitivity, such as organizational problems. So we just don't govern as much." In Texas it was noted that, "It takes longer to resolve matters this way. We take less action and provide more direction instead." The Administrative Conference of the US noted that at the federal level sunshine procedures have shifted the pattern of decision-making away from collegial exchange and toward one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation. In response to this problem, a Florida decision (Bennet v Warden) stated: "It would be unrealistic to require that every meeting, every contact, and every discussion with anyone from whom executive officers . . . would seek counsel or consultation to assist in acquiring necessary information, data or intelligence needed to advise or guide authority by whom they are employed be a meeting within disciplines of the Sunshine Law."

Administrative Costs. Openness generates concrete administrative costs. Satisfying notice requirements, provision of agendas, recording and transcription of meetings, etc., require commitments of time, labor, and material resources. Notice requirements also force administrators to move more slowly as they

wait for appropriate time periods to elapse before they can address a problem, with consequent hidden costs. Several states require the publication of a schedule of meetings at the beginning of each year, incurring the time and labor costs of planning of a kind that may not internally be perceived as necessary. The need to facilitate public attendance at meetings means that rooms and electronic equipment have to be reserved. "Complying with open meeting requirements takes more and more energy," summarizes one administrator.

In states like Florida and Minnesota, with strong commitments to openness, such costs are not noticed as openness procedures are well embedded in general administrative procedures and simply considered good practice. At the opposite end of the spectrum, however, Pennsylvania administrators will say only of the additional procedures and their concomitant costs incurred by openness that, "We've learned to live with it." And regarding the possibility that a law presently in the Pennsylvania legislature that calls for extending open meeting provisions to committees (presently only governing boards must operate in the sunshine in that state), "If that passes, it will be a real headache." (But of course the reduction of headaches among administrators is not an over-riding objective of public policy.)

In all states, the imposition of additional administrative procedures upon decision-makers means that people who are hired to do one thing wind up doing another, lesser, thing. Time that could be spent moving forward is spent treading water in one place, reducing activity more directly in the public interest.

Effects upon the Decision Making Process. Openness alters the

decision-making process in four ways. Together, university and college administrators argue, these changes in the process cause the quality of decision-making for an institution to seriously decline, hampering its ability to respond rationally to its environment and reducing the exercise of its natural instincts toward survival.

First, when: A prudent institution that would attempt to foresee potential problems and forestall them before they arise, address minor irritants before they become major problems, and institute regular reviews of its program to prevent difficulties is penalized under open meeting laws. A public audience can turn a description of possible events into a schedule of predictions, a suggestion of an irritant into a crisis, a range of alternatives into fait accompli, and constructive criticism into major program weaknesses. Thus organizations that operate in the open tend to squelch their urge to exercise foresight and good planning, and find themselves dealing only with current problems. A reasoned and well-thought-out decision-making process becomes crisis-oriented, long-term planning turns into short-term, and short-term planning becomes first-aid. "It slows down our response times," notes a presidential assistant from Minnesota. "And this is especially problematic because we must address 4-5 times more issues annually than a university faced 30 years ago. As a result, we're less competitive."

Second, who: One type of response when top-level administrators feel that a type of significant discussion simply cannot be held in the open despite the demands of sunshine laws is to

kick the decision downward in the hierarchy until it gets to a point where the decision-making group or individual is no longer covered by those laws. Thus line decisions are turned over to staff, and matters that should be dealt with at the highest levels of management are handled by those with far less training, knowledge, and experience. One university attorney noted, "Openness cuts public governing boards off from the most important decisions. They don't get involved until the decisions have already been made." A second type of response is to move the decision-making upward, so that decisions that should be made collegially are made unilaterally by the chief executive.

Third, what: With the distortions to discourse described above, the same arguments and information may not arise during deliberation by decision-making bodies that might surface during closed sessions. As a consequence, the content input that shapes a decision changes, and the outcome itself is oftentimes different from what it might have been were members of the body solely concerned about finding the best solution to a problem, and not about how they appeared while they are doing it.

Fourth, why: Rather than making decisions as necessary for the best running of the institution, decision-making in the open can become a strategy tool for relations of the administration with its constituencies. Negative decisions may be avoided, and positive decisions held up until they can serve a strategic use--perhaps just before an evaluation or an election. A movement to eliminate a popular but poorly-rated program may be deflected towards one less popular, though perhaps highly rated and/or critical to the state

economy. Tenure decisions may be made on political, rather than academic, grounds. In general, the "squeaking wheel" will be served over the public interest.

Elevation of the Power of Procedure. Openness encourages reliance upon procedure. With increasing openness, administrators lose their sense of control over the governing process. "They lose their sense of timing—they don't know who knows what when," says one scholar of educational administration. Consequently, leadership of universities retreats into procedure. This reliance opens the door to the replacement of substantive discussion by procedural objections. New ideas can be stopped by claiming that not enough copies of a proposal were circulated.

An emphasis upon procedure also tends to bring things to a vote that weren't in the past voted upon, such as the formation of academic departments. Matters that used to be handled flexibly, such as faculty sick leave, are forced into contractual constraints rather than being left to administrative discretion. And with formal voting procedures come endless discussions about who gets to vote on what, replacing discussion that in the past worked towards consensus decision-making on substantive issues.

Reduction of Innovation. Openness stifles innovation. In opening the decision-making process, conservative solutions to problems are favored, while new ideas are discouraged. There is less brain-storming, and more use of procedural objections to ward off innovations for which the public is unprepared. As one administrator has noted, the only solution to a problem that cannot be vetoed is the

status quo. This trend runs counter to the growing awareness that healthy organizations must have imbedded within them a propensity and ability to innovate—and that freedom for exploratory discourse is a fundamental part of that ability.

Effects upon the Evaluation Process. Openness alters the evaluation process. A canon of good governance requires periodic evaluation of organization leadership such as university presidents and governing boards, and of programs. Yet the requirements of open meeting laws can make such evaluations impossible at worst and meaningless at best. Those among whom independent evaluators conduct their research will not give frank comments about the abilities of a president with whom they will have to continue to work if their comments will be made public; evaluators will be reluctant to display in public what they perceive as the weak points of a president, for fear that any sign of weakness will be seized upon by the public as fatal, weakening the president's ability to govern; governing boards won't want to discuss an evaluation among themselves or with the president for the same reason; and the president himself as a result will not benefit from a real evaluation. "If you want to have an adversarial situation," comments one Montana observer, "conduct a presidential evaluation in public; but if you really want to use evaluations to improve job performance, you can't do it in the public eye."

In many states the evaluation process is protected as among the personnel matters that are exempted from the requirement to be conducted in the open. In others, states never conduct a formal

evaluation process, avoiding the potential problem altogether. But when the University of Montana a couple of years ago decided that a more formal evaluation procedure would benefit the institution and its leadership and sought to approach the process more professionally, it was immediately challenged by the Missoulian on open meeting grounds. Ultimately, Montana's unusually powerful constitutional privacy provisions won out and the contents of the presidential evaluation were allowed to remain confidential. It was reported however, that in the future, "Presidential evaluation reports will probably be sanitized."

At the University of Minnesota a recent 10-year evaluation--by an external consultant of the strengths and weaknesses of its president was conducted orally and its results presented to regents one by one and never discussed as a group. This procedure was adopted to place the process beyond the reach of the sunshine law, on the assumption that such an evaluation, to be worth anything, must be confidential. It was challenged in court by the Minneapolis Star & Tribune, however, on open records grounds, for the Minnesota Data Privacy Act covers oral information that would have to be made public were it to be written down. The paper secured a court order forcing the regents to record what they remembered of the oral evaluation. A memorandum which accompanied the court order self-contradictorily admitted that the disputed evaluation was of "[The President's] performance and the identification of areas that require strengthening or high priority attention," yet "The Minneapolis Star and Tribune seeks and is entitled to access to that part of the report which is not a

privileged employment evaluation of [the President]." Each regent who had talked to the consultant signed an affidavit that there was nothing in the conversation which didn't fit that exception. Following discussions between the university and the newspaper, the matter appears to be at rest, though the paper continues to feel that the University often withholds information which it should by law divulge to the public, and that among public institutions the University is particularly difficult in this respect.

The same types of problems occur when governing boards attempt to evaluate themselves. Ultimately, this can prevent the process from occurring altogether, pulling the rug out from under attempts by governing boards to improve their ability to function. This occurred at the University of Minnesota, where the board of regents had regularly participated in a self-evaluation process according to AGB-established procedures every five years. As challenges to the state sunshine law arose over the years, however, it was decided by the courts that the statute applied to every meeting of a majority of a quorum of any body, whether meeting formally or informally. Thus the press began joining the board of regents on retreats, in backgrounding discussions—and during the evaluation process. Now, while individual board members do fill out a self-evaluation questionnaire every five years, the board as a whole never gets together to discuss the results, share viewpoints with each other, or conduct any of the other activities that might lead a group of decision-makers to understand each other better and thus function better as a group.

The University System of South Texas recently received a favorable ruling from the attorney general's office in its attempt to protect preliminary documents produced as part of an accreditation procedure. Among the arguments used, the system claimed that disclosure of the papers would destroy the accreditation process altogether:

The public interest in confidentiality of preliminary self-evaluation materials outweighs the public interest in disclosure when such information used for a purpose and in a manner for which it was not intended causes irreparable damage to an institution under the aegis of sunshine laws.

A similar argument was used in a 1973 Attorney General's opinion where it was ruled that some meetings could be closed if the requirement that they be open would interrupt the agency's activities and cause unnecessary delays in agency actions.

Effects upon the Search Process. The effects of openness upon the presidential search process often seem the most extreme of all. The results can be dramatic for the institution and tragic for the individual, for the role of president has high gossip value for the press. As with other areas of impact, the degree of influence of sunshine laws varies from state to state. In Florida, for example, the entire process, including the actual interview of final candidates, must be conducted in the open and often actually occurs before television cameras. At the other extreme, as in Pennsylvania and many other states, the personnel exemption protects the entire presidential search process up through announcement of the final

selection, subjecting candidates only to the unavoidable danger of potential leaks. (Most states with protected search processes, however, find it is still in their best interest to release the names of candidates on the final short list and allow the public to participate interact with candidates as part of the final steps of the process. This serves as a safety valve, helps take the "sunshine" pressure off the earlier parts of the process, and may even allow the public to interact with candidates during the final steps of the process.) In between lie the vast majority of states which must open their processes to the degree of at least disclosing the names of either some or all candidates.

Three types of damage to the search process are cited:

First, many believe argued that most of those who would be the best candidates remove themselves from the pool, or never allow themselves to get into the pool, deciding they don't want a position they would have to "run for" in public. They may do so because their effectiveness in their current positions would be reduced. Many of the most likely top university presidents are already successful elsewhere. Should their current boards and constituencies learn that they are even considering leaving, the ability of those presidents to function capably in their current positions would be damaged, often irreparably. It's a process to which a person who is employed and employable needn't be subject. Successful university presidents also may not want to risk losing a race for another position, letting it be known that for whatever reason, they were not considered the most capable choice by those elsewhere. In one major university, for

example, the top two candidates were lost to the search committee as a result of openness procedures, and they had to reopen the search and conduct another, more abbreviated, search process before a president was finally chosen.

Second, the process undergoes the same kinds of distortions to discourse discussed above, leading to discussions that are not in depth and letters of reference and other kinds of evaluations of candidates that are loaded with the favorable half of the truth. Committee members often will not be willing to share potentially damaging information in public. As David Riesman, who with his colleague Judith McLaughlin has probably thought harder about presidential searches than anyone, says, "It is widely appreciated in academic life that letters of recommendations lose all credibility if confidentiality for them cannot be guaranteed." The same problems that can occur with an open evaluation process can occur here. Additionally, committee members may fear reprisal against their programs if they speak honestly but unfavorably against a candidate who ultimately wins—or an unsuccessful internal candidate with whom they must continue to deal. Thus the results of the process are skewed and information that could be vitally important to a search committee may not come out.

Third, an open process is also subject to manipulation for political ends. The press can be used as a tool to create an atmosphere of favor or disfavor for a particular candidate, or to prevent a rival campus from obtaining a president whose light would outshine one's own. Lobbying, letter writing campaigns, and smear

tactics can all result from manipulated media coverage of a decision-making process.

These factors can combine to create unpleasant situations. Judith McLaughlin, who has done massive research in the area of presidential searches, offers the story of one candidate in a search process that was supposed to be confidential but leaked. Reports of his candidacy for one institution created enormous problems for him in his current position as president of another. Ultimately, he lost the job he was currently holding, and failed to be the choice in the search he was undergoing. With a reputation as a second choice administrator, he found it next to impossible to find any job at all and finally took a position with much less responsibility rather than continue unemployed. At worst, unpleasantness on the current campus can go so far as verbal and physical abuse of a candidate's family; at best, a president faces suspicion and distrust on the part of his or her board, faculty, and students.

To avoid these problems, many of presidential candidates who are believed to present the best qualifications and are the most known quantities will refuse to be considered for a position if the search process must be held in the open. Even so, a president whose name was considered without his or her knowledge will have a difficult time persuading relevant constituencies of that fact.

Proposals to amend sunshine laws to specifically exempt the presidential search process try to distinguish the role of university president from other positions of public leadership, and this is extremely difficult to do. The arguments that have been used to

defend the use of confidentiality during the presidential search process have also been used to defend the need for privacy in finding a new horse racing commissioner--no one wants it known by a present employer that one is seeking a new position.

The argument that presidents chosen through an open process are less qualified than those chosen through more closed procedures is weak, for it is difficult to prove the relative competence of individuals, or to measure an event that hasn't happened. It is clear, however, that open searches result in a different type of candidate pool than would otherwise develop. In a recent open search for a University of Florida president, for example, there were virtually no candidates with previous presidential experience available for consideration. Those who complain about an open search process still in general will say that they in fact got very good presidents after such a procedure--and attribute this to sheer luck.

Often open searches produce just the person expected to have been selected behind closed doors: In Minnesota, a state university conducted an extremely open search that wound up with three finalists: a white male who had risen through the state system, an older black woman from the South, and a white woman from the West. The white male was chosen. In Florida, an open search produced a white male university president known mostly for his abilities as a politician, and for his friends.

Encouragement of Mediocrity. Openness encourages mediocrity in performance. This problem arises not only in conjunction with the presidential search process, but is a concomitant of other aspects of

the effects of openness upon decision-making in general. Not only may it be more difficult to obtain the best leadership, but it is next to impossible to get rid of those who are not so good, at both the administrative and faculty levels. If discussions about an unsatisfactory professor whose contract is to be terminated need to be in the open, that professor can sue for defamation. Thus administrators will often trade the long-term benefit of high-quality faculty for the short-term benefit of staying out of court. An ineffective evaluation process prevents administrators from improving their skills, also encouraging mediocrity.

Encouragement of Criminal Behavior. When sunshine laws prove impossible to live with, public officials find ways around the law. In fact, many top administrators are not concerned about sunshine laws because they have incorporated subversion of those procedures in their operating methods. As one Texas attorney commented, "Sometimes you got to talk [to each other] the way you got to talk." Thus a very real cost of openness is its cost to the legal system—it creates a general atmosphere in which the law itself is brought into disrepute. Wherever the bounds of openness are drawn, some discussion will occur beyond the pale. Unrecorded telephone discussions or private meetings are probably the most frequently-used means of getting around the strictures of sunshine laws. The notation procedure—decision-making through sequentially commenting upon a written memorandum—may successfully avoid open meeting laws, but would be subject to the rules for open record laws in most cases.

In a sense, the question of how to draw the bounds of sunshine is

the question of whether it is better to create a class of criminal behavior that will be engaged in by almost all public officials, or better to make it legal for those officials to make decisions about public matters in private? The former approach forces illegal behavior upon those who seek to act in the public interest and could open the door to governmental take-over of higher education in the name of stopping criminal behavior. The latter approach may make it easier for abuses of sunshine laws to take place by encouraging private decision-making when it is convenient for the public officials involved, though not necessarily in the best interests of the public.

Conclusion

While the tension among the three elements of the public interest as served by sunshine laws is inevitable and provides and ineradicable and productive challenge in and of itself, a skewing in the direction of one of those elements creates problems that are recognized by the court of last resort, public opinion. The visibility of sunshine questions and frequency of disputes over the application of sunshine laws demonstrates that an appropriate balance has not yet been achieved. Some principles can be identified, however, that provide assistance in determining just such a balance:

(1) The interests of the community as a whole must be considered above the interests of any of its parts. The population to be served is the constituency of the whole, not of any special interest groups.

(2) The presumption must be in favor of openness. Tendencies toward closure must be closely monitored, strictly scrutinized, and permitted only with narrowly-defined exemptions from sunshine laws.

(3) It must be recognized that openness is only one of three elements to be balanced in determining how best to serve the public interest. The way that openness is actualized must take into account the need to protect personal privacy. And the mandate to public institutions, effectively to carry out their assigned functions, includes a definition of the role of trustees and other decision-makers that requires the collegiality of open group discussions. The particular balance among these three elements of the public interest will of course vary from institution to institution and from time to time.

(4) The needs for individual privacy and organizational effectiveness can best be protected through the use of exemptions from sunshine laws—definitions of subject matter that can be discussed confidentially. In the case of higher education, there appears to be a consensus that an appropriate balancing of the three elements of the public interest would allow, indeed encourage, the following types of exemptions: for personnel matters when a specific individual is being discussed unless that individual requests openness, for formation of collective bargaining strategy and for the negotiations themselves, for the attorney/client relationship in discussions concerning actual or potential litigation, for real estate matters, for security issues, for evaluation procedures whether of an individual, a group, a program, or the institution as a whole, for self-education sessions of governing bodies, and for the presidential selection process.

The press and institutions of higher education agree that provision of information to the public is of the highest value—it is

in fact the purpose of both types of organizations to convey usable information to the public. And they agree that such information transfer should both strengthen the democratic process and be a result of that process. With the kind of balancing of the three elements of the public interest proposed here, sunshine laws are more likely to help the media, higher education, and the public in accomplishing those goals—and less likely to continue as a major bone of contention, and a frequent source of litigation, among them.

APPENDIX I

A SPECTRUM OF OPENNESS

In order to get a feel for the range of openness across all 50 states as created by the application of sunshine laws, 23 characteristics of openness were defined. A gut response to the reading of the law, not social science, determined these characteristics. Their selection was influenced by our focus on the governance of higher education. We could not think of a universally valid way of weighting the 23 characteristics, so we didn't weight them. They nevertheless provide a starting place for discussion and a set of intriguing comparisons of what the individual states mean by "openness" and how important they think it is.

The characteristics are as follows:

1. Policy Statement. Openness is indicated by the inclusion of a policy statement exploring the intent of the sunshine law and specifying that it should be liberally construed. The California policy statement contains wording that is used by several other states and is in general indicative of the tenor of such statements:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

2. No Bodies Explicitly Exempted. Openness is indicated by all-inclusive coverage of state bodies (including agencies, commissions, boards, and branches of state government), without specifically exempting any in the wording of the law itself. This characteristic gives a feel for the tenor of the law and is also indicative of its intent. The judiciary is the body most commonly exempted by specific mention in many state laws; other bodies treated the same way include parole boards, hospital staffs, law enforcement agencies, the executive office, or fee-supported agencies.

3. All Final Action in Open Meeting. In states where executive sessions that are closed to public attendance are allowed, openness is indicated by restricting such sessions to discussion of issues and insisting upon all final action being taken in public. In such states, much detailed negotiation, bargaining and argument remain hidden from public view, but the resulting action must still be in the open.

4. Discussion in Open Meeting. Openness is indicated by the inclusion of discussion, as well as actual decision-making, in the definition of meetings that must be open to the public. The intent of policy in states in which deliberations toward a decision must be held in public is to allow the public to be fully informed of the thinking behind policy positions. As noted at 38 ALR3d 1079, a compilation referred to by several states for elucidation of the validity, construction, and application of their statutes, it was decided in *Times Publishing Co. v. Williams* (1969, Fla. App.), 222 So. 2d 470, held that "Every thought, as well as every affirmative act, of a public official as it related to and was within the scope of his official duties, was a matter of public concern"

5. Information Gathering in Open Meeting. Discussion toward a decision is interpreted to be limited to deliberation upon a particular policy position or rule which is to be delineated; it excludes general discussion, backgrounding, evaluation, or information-gathering procedures. Inclusion of the latter types of discussion in open meetings, here called "information gathering," is indicative of a further degree of openness. Again as cited at 38 ALR3d 1078, it was decided in *Adler v. City Council of Culver City* (1960), 184 Cal. App. 2d 763, 7 Cal. Rptr. 805, decided that deliberation included "not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the ultimate decision."

6. Committee Meetings Open. Depth of coverage down to the committee and subcommittee meeting level is another characteristic of openness. Insistence on openness in committee meetings demonstrates commitment to public involvement with the entire decision-making process and prevents the practice of secrecy by forming policy and rules in groups smaller than the whole.

7. Advisory Boards Open. Depth of coverage that includes advisory boards under the purview of sunshine laws also indicates openness. Advisory boards do not have decision-making capabilities, but may provide critical input into the process.

8. Informal Meetings Open. Coverage of informal meetings by an open meetings law, beyond purely social gatherings or chance encounters, discourages sidestepping of sunshine provisions by behind the scenes decision-making and thus is another indicator of openness. Several states explicitly include electronic meetings, such as those via telephone calls, under meetings covered.

9. Quasi-Judicial Meetings Open. Many states exempt quasi-judicial proceedings by administrative or legislative bodies from coverage by sunshine laws. Refusal to permit executive sessions for quasi-judicial purposes indicates openness.

10. Meetings of Local Entities Open. The extension of state sunshine laws to local entities is another indicator of openness.

11. Meetings of Less Than Quorum Covered. Openness is indicated by coverage of meetings of less than a decision-making

quorum. This provision would permit public access to the range of small-group discussions that precede policy formulation or rule-making.

12. Involved Parties May Request Openness. Provision for requests by involved parties for open proceedings when by law they are permitted to be closed indicates openness. Such provisions are most often attached to the inclusion of personnel topics as subjects which may be discussed in executive sessions. (The converse--closure upon request of involved parties--is often attached to provisions for discussion of labor negotiation topics in executive session.) (If a state does not allow executive sessions at all, it was also assigned a point in this category.)

13. Substantial Minutes of Closed Meetings Required. The requirement that substantial minutes, usually noting topics discussed, all motions and proposals presented, and individual votes upon motions and proposals, indicates openness. Arizona specifies that minutes must disclose enough information so that the public can understand the basic subject matter of an action to be taken. Many states, however, require minutes only of open meetings. Others request only that the general topic and time of discussion of executive sessions be noted, which would not qualify as "substantial." Most states that have established a requirement for substantial minutes of closed meetings do permit those records to remain confidential in order not to contravene the purpose of the closed session; however, they remain available for resolution of difficulties that may arise if a decision made in closed session is challenged. (If a state does not allow executive sessions at all, it was also assigned a point in this category.)

14. Remedial Action--Voiding or Equitable Relief. Openness is indicated by legal provision for remedial action should sunshine laws be contravened. The two favored methods of remedial action are a simple voiding of any decision made using procedures that are not in accordance with a state's open meetings law, or application of equitable relief (usually an injunction, but in many states provision is also made for a writ of mandamus and/or a declaratory judgment).

15. Criminal Penalty May Be Levied. Openness is further indicated by establishment of criminal penalties for contravention of sunshine laws. Penalties usually include a fine and/or a jail term, and may increase in size with repeated violations.

16. Exemptions Exclusive. Exemptions, or subject matter which may be exempted from open meetings provisions and discussed in closed, executive session, are either noted individually in each state law, or the law states specifically that there are no exemptions. A statement that the exemptions listed are exclusive indicates a greater degree of openness than is found in states that include among their exemptions an open-minded provision for closure of meetings for other than listed reasons. (If a state does not allow executive sessions at all, it was also assigned a point in this category.)

17. Personal Character or Reputation. Openness is indicated

by an insistence that discussions that may affect a person's character or reputation must be conducted in the open.

18. Employment. Openness is indicated by an insistence that general personnel discussions, including employment or appointment of individuals, are to be held in the open.

19. Property. Openness is indicated by an insistence that discussions surrounding property transactions be conducted in the open.

20. Other Financial. Openness is indicated by the lack of provision for discussion of other types of financial matters in executive session. In some states, investment decisions, donations, or any decisions regarding matters that may have a financial impact may be discussed in executive session.

21. Legal. Openness is indicated by a requirement that discussions of a public body with its legal counsel be conducted in the open.

22. Labor Strategy. Openness is indicated by requiring that strategy sessions of public bodies preparing for labor negotiations be held in the open.

23. Labor Negotiations. Openness is indicated by requiring labor negotiations themselves be held in the open.

In order to develop a nation-wide spectrum of openness, each of the above characteristics was assigned one point. The sum of points for each state was its "score," a high score indicating greater openness, and a low score indicating a state with less openness. Points were assigned based only on a reading of the annotated laws, and thus do not take into account elaborations or interpretations of the laws that may have occurred as case law has further developed. A chart showing the point assignments lies below; the spectrum is as follows:

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	Policy statement	No bodies explicitly exempted	All final action in open meeting	Discussion in open meeting	Information gathering in open meeting	Committee meetings open	Advisory boards open	Informal meetings open	Quasi-judicial meetings open	Meetings of local entities open	Meetings of less than quorum covered	Involved parties may request appearance	Substantial minutes of closed meetings required	Remedial action - voiding or equitable relief	Criminal penalty may be levied	Exemptions exclusive	Personal character or reputation	Employment	Property	Other Financial	Legal	Libels strategy	Labour negotiations	Total of 2
Alabama	X	X	X	X	X	X		X	X	X				X	X	X		X	X	X	X	X	18	
Alaska	X		X	X		X	X					X		X	X	X		X	X		X	X	17	
Arizona	X		X	X		X	X		X	X		X		X	X	X		X	X		X	X	17	
Arkansas	X	X	X			X		X	X	X				X	X	X			X	X		X	X	14
California	X		X			X	X			X		X	X	X	X	X		X					11	
Colorado	X	X	X	X				X	X		X			X	X	X							12	
Connecticut	X					X		X	X			X	X	X	X	X							10	
Delaware				X		X	X	X	X	X		X	X	X	X	X						X	10	
Florida			X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	20	
Georgia			X	X					X	X		X	X	X	X	X	X	X	X			X	9	
Hawaii	X		X	X		X			X			X		X	X	X				X		X	9	
Idaho	X		X	X		X				X			X	X	X	X							8	
Illinois	X		X	X	X	X	X	X	X	X	X			X	X	X							13	
Indiana	X	X	X	X	X	X	X	X	X					X	X	X							11	
Iowa	X	X		X		X		X	X			X	X	X	X	X							12	
Kansas	X		X	X		X	X	X	X	X	X	X		X	X	X						X	12	
Kentucky			X	X	X	X	X	X	X	X		X	X	X	X	X							12	
Louisiana	X		X	X		X	X		X	X		X		X	X	X		X					11	
Maine	X	X	X			X		X	X	X		X		X	X	X				X			11	
Maryland	X		X	X		X	X	X	X				X	X	X	X							20	
Massachusetts			X	X		X						X	X	X	X	X		X	X				9	
Michigan			X	X	X	X		X	X	X				X	X	X		X	X				12	
Minnesota				X	X	X		X		X	X	X		X	X	X		X	X	X			12	
Mississippi	X					X		X	X				X	X	X	X					X	X	9	
Missouri		X		X	X	X	X	X	X	X				X						X		X	11	
Montana	X	X		X	X	X	X	X	X	X		X		X		X		X	X	X	X	X	10	
Nebraska	X		X	X	X	X	X	X	X	X		X	X	X	X	X		X	X			X	10	
Nevada	X		X	X		X	X	X	X	X		X	X	X	X	X		X	X	X	X	X	17	
New Hampshire	X			X		X	X		X	X		X	X	X		X				X	X	X	13	
New Jersey	X			X	X	X			X	X		X	X	X		X							10	
New Mexico	X	X	X	X	X	X			X	X		X		X		X							12	
New York	X			X	X	X	X	X		X				X		X							9	
North Carolina	X			X	X	X	X	X	X				X	X									16	
North Dakota			X	X	X	X		X	X	X				X	X					X	X	X	13	
Ohio	X	X	X	X		X		X	X	X	X	X		X	X	X				X	X	X	11	
Oklahoma	X		X	X	X	X	X	X	X	X				X	X	X				X	X		16	
Oregon	X		X	X	X	X	X	X	X	X		X	X	X	X	X							13	
Pennsylvania		X				X		X	X														4	
Rhode Island	X			X		X		X	X		X	X	X	X	X	X		X					10	
South Carolina		X	X	X				X	X	X		X		X	X					X		X	11	
South Dakota		X	X	X				X	X											X	X	X	9	
Tennessee	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	21	
Texas			X	X		X		X	X					X	X	X							9	
Utah	X	X	X	X		X	X	X	X					X	X	X		X					13	
Vermont	X		X	X	X	X			X					X	X	X			X			X	10	
Virginia	X	X	X	X		X		X	X	X				X	X	X				X			12	
Washington	X		X			X						X		X		X				X	X	X	9	
West Virginia	X		X	X		X	X	X	X			X		X	X	X							10	
Wisconsin	X		X	X		X		X	X					X	X	X				X	X	X	10	
Wyoming	X		X			X								X	X	X							8	

Further Breakdowns of State Sunshine Laws

The following charts provide finer detail on some aspects of state sunshine laws.

The first describes the criteria by which coverage of specific bodies by a state's sunshine laws is determined. The terms include: "public funding" (coverage of bodies supported in whole or in part by public funds); "public spending" (coverage of bodies which have the responsibility of spending public monies); "created by law" (coverage of any body created by statute or law); "public function" (coverage of any body which serves a public function); "policy- or rule-making" (coverage of any body which is responsible for making policy or establishing rules for the public); "enumeration" (coverage of bodies enumerated within the law).

The second chart shows the number of people considered in each state to constitute a "meeting" for purposes of the sunshine laws.

The third shows which specific sanctions for violation of sunshine laws, including civil penalties, are allowed by each state. In general civil penalties were so mild that they were not deemed to establish effective deterrents to violation of sunshine laws, and thus their inclusion in a state law was not defined as a characteristic of openness.

I.
CRITERIA FOR COVERAGE BY SUNSHINE LAWS

	Public Funding	Public Spending	Created by Law	Public Function	Policy- or Rule-making	Enumera- tion
Alabama		X			X	X
Alaska	X	X				
Arizona	X	X			X	
Arkansas	X	X			X	
California				X		
Colorado					X	
Connecticut			X			X
Delaware				X		
Florida			X			
Georgia			X			
Hawaii			X			
Idaho			X			
Illinois	X	X		X		
Indiana	X				X	
Iowa			X			X
Kansas	X	X			X	
Kentucky			X			
Louisiana					X	
Maine				X		
Maryland			X			
Massachusetts				X		
Michigan			X		X	
Minnesota				X		
Mississippi					X	
Missouri			X			
Montana	X	X		X		
Nebraska			X			
Nevada	X	X				
New Hampshire				X		
New Jersey		X			X	
New Mexico					X	
New York				X		
North Carolina			X		X	
North Dakota	X	X		X		
Ohio					X	
Oklahoma					X	X
Oregon				X		
Pennsylvania				X		
Rhode Island			X			
South Carolina	X	X		X		
South Dakota	X		X			
Tennessee				X		
Texas						X
Utah					X	
Vermont				X		
Virginia	X					
Washington			X			
West Virginia			X			
Wisconsin			X			
Wyoming			X			

II.
COMPOSITION OF MEETINGS COVERED BY SUNSHINE LAWS

	Two or More	Majority of Quorum	Quorum	No Numerical Definition
Alabama				X
Alaska				X
Arizona			X	
Arkansas				X
California			X	
Colorado	X			
Connecticut			X	
Delaware			X	
Florida	X			
Georgia			X	
Hawaii			X	
Idaho			X	
Illinois		X		
Indiana			X	
Iowa			X	
Kansas		X		
Kentucky			X	
Louisiana			X	
Maine			X	
Maryland			X	
Massachusetts			X	
Michigan			X	
Minnesota			X	
Mississippi			X	
Missouri				X
Montana			X	
Nebraska				X
Nevada			X	
New Hampshire			X	
New Jersey			X	
New Mexico			X	
New York			X	
North Carolina			X	
North Dakota				X
Ohio	X			
Oklahoma			X	
Oregon			X	
Pennsylvania			X	
Rhode Island				X
South Carolina			X	
South Dakota				X
Tennessee	X			
Texas			X	
Utah			X	
Vermont				X
Virginia	3 or more			
Washington				X
West Virginia			X	
Wisconsin			50%	
Wyoming			X	

III.
SANCTIONS WHICH MAY BE LEVIED FOR FAILURE TO ACT
IN ACCORDANCE WITH SUNSHINE LAWS

	Voiding of Action	Equitable Relief	Civil Penalty	Criminal Penalty	Increase for Repetitions
Alabama		X		X	
Alaska	X				
Arizona	X	X		X	
Arkansas	X	X		X	
California		X		X	
Colorado	X	X			
Connecticut	X	X	X	X	X
Delaware	X	X			
Florida	X			X	
Georgia	X				
Hawaii	X	X			X
Idaho	X				
Illinois	X	X		X	
Indiana	X	X			
Iowa	X	X	X		X
Kansas	X	X	X		
Kentucky	X	X		X	
Louisiana	X	X			
Maine	X			X	
Maryland	X	X			
Massachusetts	X	X			
Michigan	X	X	X	X	X
Minnesota		X	X		X
Mississippi	X	X			
Missouri	X	X	X		
Montana	X				
Nebraska	X	X		X	
Nevada	X	X		X	
New Hampshire		X			
New Jersey	X	X	X		
New Mexico	X	X		X	
New York	X	X			
North Carolina		X			
North Dakota	X			X	
Ohio	X	X			X
Oklahoma	X			X	
Oregon		X	X		
Pennsylvania			X		
Rhode Island	X	X			
South Carolina		X		X	X
South Dakota				X	
Tennessee	X	X	X		
Texas	X	X		X	
Utah	X	X			
Vermont				X	
Virginia		X	X		
Washington		X	X		
West Virginia	X	X		X	
Wisconsin	X	X	X		
Wyoming	X				

APPENDIX II

JUDICIAL AND ATTORNEYS GENERAL OPINIONS
APPLYING SUNSHINE LAWS TO HIGHER EDUCATION

ALASKA

Alaska Community Colleges' Federation of Teachers, Local 2404 v University of Alaska, 677 P2d 886 (Alaska 1984): The state supreme court remanded the case, noting that should it be found that the Board of Regents of the newly-formed University of Alaska had violated the open meeting act when merging the University out of two colleges, it would be difficult to fashion a remedy in which the damage to the university would not outweigh the remedial purposes of the sunshine law.

University of Alaska v Geistauts, 666 P2d 424 (Alaska 1983): It was decided that the evaluation of the tenure candidacy of a faculty member who was subsequently denied tenure was conducted in violation of the state open meeting law, and the entire evaluation process should begin again.

ARKANSAS

Arkansas Gazette Co. v Pickens, 522 SW2d 350 (1975): Meetings of the University of Arkansas trustees Student Affairs Committee are covered by the open meeting law because all committees of official bodies are covered by the act, preventing the detailed work behind formal decisions from being hidden from the public view.

ARIZONA

Rosenberg v Arizona Board of Regents, 118 Ariz 489, 578 P2d 168 (1978): The board of regents and tuition appeal committees of the state university are bodies within the meaning of the open meeting law and are not exempted by the exception for judicial proceedings.

Cooper v Arizona Western District Governing Board, 125 Ariz 463, 610 P2d 465 (Ct App 1980): The college's governing board acted in violation of the state open meeting law when it decided in executive session to terminate the contracts of several faculty members.

CALIFORNIA

64 OAG 875, 12-11-81: Regents of the University of California are not covered by the open meeting law.

65 OAG 638, 12-30-82: Members of the state board of the California community college student governing association are subject to the open meeting law.

COLORADO

Associated Students of University of Colorado v Regents of the University of Colorado, 189 Colo 482, 543 P2d 59 (1975): The open

meetings law, as a general law, does not repeal other statutory or constitutional provisions and thus does not revoke the attorney-client privilege; therefore the Board of Regents may meet in executive session for communications with its attorney.

CONNECTICUT

OAG, 10-16-75: Meetings of a Joint Teacher Committee, composed of three members of the State Board of Education and three members of the Commission for Higher Education, are in fact meetings of each group and therefore covered by the state open meeting law.

Freedom of Information Commission, FIC80-199, 3-25-81: A dean of students staff committee organized to recommend university policy regarding campus alcohol use is not a public agency under the state's FOI law.

Freedom of Information Commission, FIC81-196, 5-12-82: Discussion in executive sessions convened by the Board of Trustees of the University of Connecticut must be restricted to subject matter permitted by law.

Freedom of Information Commission, FIC83-68, 10-26-83: The faculty of the University of Connecticut's School of Law is subject to the open meeting law.

Freedom of Information Commission, FIC83-59, 11-23-83: Persons whose employment is to be discussed in executive session must receive adequate notice that such discussion will take place.

Freedom of Information Commission, FIC83-61, 11-23-83: Attachments to open meetings agendas must be made available to the public upon request.

Freedom of Information Commission, FIC83-60, 3-28-84: Notice that a recommendation concerning an individual's employment will be discussed in a specific executive session of the University of Connecticut's Board of Trustees is sufficient notice to the individual involved.

FLORIDA

Szymanski v University of Florida, 01-8283CA (Fla 8th Cir Ct 1981): In a case where the sunshine law came into conflict with the open records law, a candidate for dean of the University was at the time an employee of the University. The conflict was not resolved, however, for the candidate waived her right to privacy for her personnel files.

In Re Dinnan, 661 F2d 426 (5th Cir 1981): Tenure voting may not be concealed by a claim of academic freedom.

Bennet v Warden, 33 So2d 97 (Fla App 1976): Fact-finding meetings between the president of St. Petersburg Junior College and representatives of "career employees" of the college are not covered by the sunshine law.

Marston v Gainesville Sun Publications Co., Inc., App., 314 So2d 257 (1975), appeal after remand 341 So2d 783: The honors court may meet

in closed session to honor the confidentiality of student records.

Wood v Marston, 442 So2d 934 (Fla 1983): When decision-making authority is wielded by a faculty committee, that committee is then subject to sunshine law requirements. Thus, the dean search committee of the University of Florida's law school must conduct its meetings in the open.

OAG 074-627, 1974: Advisory committees to the president of a university should meet in the open.

GEORGIA

McLarty v Board of Regents of the University of Georgia, 231 Ga 22, 200 SE2d 117 (1973): A committee formed by the Dean of Student Affairs of faculty members and students to discuss student activity fund allocations recommended by the student senate is not subject to sunshine laws because it is not empowered to take official action.

ILLINOIS

People ex rel Maciuba v Cheston, 25 Ill App3d 224, 323 NE2d 40 (1974): Assault and battery charges by three nonmembers against members of the university faculty senate who expelled the nonmembers from a meeting were actually charges against the state, and thus subject to the exclusive jurisdiction of the court of claims.

Pope v Parkinson, 48 Ill App3d 797, 363 NE2d 438 (1977): The administrator of a public facility at the University of Illinois is free to consult with informal advisory committees regarding use of that facility, an internal university affair, without being subject to openness requirements.

People ex rel Byron v Board of Trustees of Southern Illinois University, 412 NE2d 1188 (Ill App 1980): Meetings of the Board of Trustees of Southern Illinois University must be open.

OAG S-917, 1975: Actions of the intercollegiate athletic board of Eastern Illinois University were covered by the open meeting law.

IOWA

Greene v Athletic Council of Iowa State University, 251 NW2d 559 (1977): The Iowa State Athletic Council, as a body authorized by the laws of the state, must open its meetings in accordance with the state's sunshine law.

OAG (Poncy), 1-4-78: Nonprofit organizations to which regents transfer state funds are covered by state sunshine laws because they have become, in effect, state agencies.

OAG (Richey), 5-16-79: Hearing panels of the Faculty Judicial Commission at the University of Iowa are not covered by the sunshine law because it was not directly created by the Board of Regents, nor does it exercise any policy-making or decision-making authority.

KANSAS

OAG 80-239: The Kansas University Endowment Association, a non-profit private corporation with the purpose of securing aid for the university, is not covered by the state sunshine law because it is not an agency of the state, nor does it use public funds or employees to carry out its activities.

OAG 82-172: Opinion 80-129 applies as well to the Wichita State University Endowment Association.

KENTUCKY

Courier Journal and Louisville Times Co. v. University of Louisville, 596 SW2d 374 (Ky Ct App 1980): Though a foundation formed for the purpose of holding title to the University of Louisville's real and personal property was not a public agency in accordance with the terms of the state's open meeting law, the close relationship between the foundation and the university's Board of Trustees, plus the fact that the foundation's governing board included the entire Board of Trustees of the University, led to a decision that the foundation's meetings are in fact subject to the open meeting law.

OAG 78-776: The screening committee for the president of Western Kentucky University is not a public agency according to the state open meeting law.

OAG 74-639: A student government association meeting is a private meeting, and therefore its degree of openness is a matter to be ruled upon by the organization itself.

LOUISIANA

Phillips v Board of Supervisors of Louisiana State University and Agric. and Mech. College, 391 So2d 1217 (La App 1980): Meetings of regents of state universities and colleges in Louisiana must be held in the open.

OAG, 11-9-73: The Louisiana Coordinating Council for Higher Education is covered by the state open meeting law, but its committee meetings are not.

MASSACHUSETTS

OAG 47, 1965-66: Trustees of the University of Massachusetts could hold a closed session to decide on the location for a new medical school, and could keep their votes secret as well.

OAG 12, 1976-77: A university board of trustees can establish rules that would allow it to close meetings.

MICHIGAN

Regents of Univ. of Michigan v. Washtenaw County Coalition Against Apartheid, 296 NW2d 94 (Mich App 1980) and Booth Newspapers, Inc. v. Regents of the University of Michigan, 93 Mich App 100, 286 NW2d 55

(Mich App 1979): Meetings of the Board of Regents of the University of Michigan must be open.

OAG 5505, 1979: Promotion, tenure, and budget committees of Wayne State University are advisory boards and therefore not covered by that state's open meeting law.

OAG 6053, 1982: The above decision was applied to Central Michigan University.

MISSOURI

Tribune Publishing Co. v. Curators of University of Missouri, 661 SW2d 575 (Mo App 1983): Informal social meetings of the Board of Curators are open to the public.

OAG 18 (Koplik), 1-19-81: The Coordinating Board of Higher Education of the state is subject to open meeting laws.

MONTANA

The Missoulian v Board of Regents of Higher Education, ____ P2d ____ (Mont 1984): Presidents of the Montana University System do not waive their constitutional rights of privacy by virtue of accepting their positions as highly placed governmental officials; thus performance appraisals of presidents may be discussed in closed meetings.

NEW YORK

Bigman v Siegel, Sup. Ct., Queens City, NYLJ (1977): Wueens College Committee on Faculty Personnel and Budget found not to be subject to open meetings law because it can only make recommendations. (Note: Decision would probably be reversed under amended law.)

New York University v Whalen, 46 NY2d 734 (1978): The courts have discretion in the granting of remedial relief for violation of the open meeting law; such relief is warranted only upon a showing of good cause.

Warder v Board of Regents of the University of the State of New York, 75 AD2d 666, 426 NYS2d 849, aff'd 53 NY2d 186, 440 NYS2d 875, 423 NE2d 352, cert denied 102 SCt 984: The right of the Board of Regents to conduct an executive session in accordance with its attorney-client privilege was upheld.

Holden v Board of Trustees of Cornell University, 80 NY App Div2d 378, 440 NY Supp2d 58 (1981): Even though Cornell University is a private institution, it receives public funds in order to administer its four statutory colleges and therefore is subject to the state sunshine law.

Student Association of the State University v Wharton, Sup Ct., Albany Cty. (1981): Discussions and subsequent vote by State University Board of Trustees in executive session concerning financial situation and credit history of the university in relationship to dormitory rental increase were appropriate under the open meeting law.

Brown v Casier, 469 NYS2d 165 (1983): The open meeting claim of tenured faculty members regarding their termination for financial reasons was not processable via the grievance procedures of their collective bargaining agreement.

NORTH CAROLINA

Student Bar Association Board of Governors of the School of Law, University of North Carolina at Chapel Hill v Byrd, 293 NC 594, 239 SE2d 415 (1977): The law school faculty is not a governing body by the terms of the state's open meeting law, despite the fact that it exercises some decision-making authority, since the faculty's decisions could be overturned by the Board of Governors.

OKLAHOMA

Carl v Board of Regents of University of Oklahoma, 577 P2d 912 (1978): Application of the open meeting law to the admissions board of the University of Oklahoma Medical School, composed entirely of faculty, senior medical students, and physicians, is appropriate.

OAG 79-13, 1979: The student government association and residence halls association of the state university are subentities of the State Board of Higher Education and therefore covered by the state sunshine law.

OAG 81-135, 1981: The governing boards of state operated institutions of higher education may not hold executive sessions to hear evidence and discuss student disciplinary matters which may come before it.

OAG 82-63, 1982: The Budget Council of the University of Oklahoma will fall within the definition of a public body if it exercises actual or de facto decision-making power in work that is public by nature.

OREGON

Southwestern Oregon Pub. Co. v Southwestern Oregon Community College District, 28 Or App 383, 559 P2d 1289 (1977): Collective bargaining sessions with a retained mediator are not meetings of either a governing body or a public body, and therefore are not subject to state sunshine law restrictions.

39 OAG 480, 1-12-79: A written personnel evaluation of a community college president is exempt from public inspection under the state open record law; therefore, the evaluation can be discussed in executive session according to the open meeting exemption for discussions "to consider records that are exempt by law from public inspection."

44 OAG ___, 6-27-84: Student government committees that prepare and recommend incidental fee assessments and allocations are covered by the state open meeting law, even should that committee include some non-student members.

SOUTH CAROLINA

OAG, 6-1-84: The tenure committee of Lander College is a public body for the purposes of the open meeting act; therefore, both positive and negative votes taken in executive session must be ratified in public before they become effective. Nothing in the open meeting law forces an individual to vote the same way in public as he or she did in private.

TENNESSEE

Fain v. Faculty of the College of Law of the University of Tennessee, 552 SW2d 752 (Tenn Ct App 1977): Neither faculty meetings nor faculty committee meetings need be open under the Tennessee sunshine law, since they have authority only to make recommendations to an administrative officer, not to a public body.

TEXAS

OAG H-246 (1974): The board of regents of a state university can't meet in closed executive session to consider conferring an honorary degree unless the candidate is also an officer or employee of the university and the meeting relates to his or her employment or appointment.

OAG H-438 (1974): The Athletic Council of the University of Texas at Austin is a government body which supervises public business, and therefore must comply with state open meeting laws.

OAG H-772 (1976): A meeting of a group of employees, such as the general faculty of a state college or university, need not comply with sunshine laws; thus the Texas Tech. Athletic Council is not covered as long as it exercises no control over public business or policy.

OAG H-1045 (1977): The Board of Directors of the Texas A&I university system can use whatever selection method it desires for appointment of administrative officers as long as it isn't arbitrary or capricious, but it cannot close meetings for the general purpose of "discussion of personnel changes" when they concern the positions of chancellor of the university system or president of a university, because those are positions in which the public has a legitimate interest.

OAG (1984): An accreditation committee of the University of South Texas System need not disclose internal working documents derived from meetings held during the accreditation process.

WASHINGTON

Cathcart v Andersen, 85 Wash2d 102, 530 P2d 313 (1975): Since the law school faculty exercises decision-making powers in changing the curriculum, amending scholastic standards, and taking final action in sponsorship of guest speakers, it exercises decision-making authority and thus is a governing body of a public agency, subject to the state sunshine law.

In Re Consolidated Hearings on Appeals, Appellants Refai and Ware,

(Hearing Officer Beles, 9-9-83): As a policy-making body, a faculty senate executive committee that developed criteria for determining how departments and programs would be selected for reduction to meet budgetary needs, is covered by the state open meeting law.

WISCONSIN

OAG 12-10, 1968: Faculty meetings at Wisconsin state universities are subject to the state open meeting law.

OAG 2-23, 1977: Departments and other formally constituted subunits of the University of Wisconsin are governing bodies and therefore subject to the state open meeting law, though exempt from certain notice requirements. Promotions not relating to tenure, merit increases, and property purchase recommendations may be discussed in closed session.

OAG 2-25, 1977: University of Wisconsin committee meetings in which power is limited to voting on recommendations and final power rests in the Board of Regents are still covered by the sunshine law.

OAG 8-6, 1980: The Wisconsin Student Association is not a public agency and therefore not subject to sunshine laws; however, it may not hire an attorney without consultation with the chancellor and confirmation by the university's Board of Directors.

OAG 12-8, 1981: The United Council of University of Wisconsin Student Governments is not covered by the state open meeting law, as it is not a governmental body but rather was created by students themselves.

NOTE: Ann H. Franke of the AAUP contributed to this compilation, and has analyzed in further depth some of the most significant decisions.

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SPECTRUM OF STATE SUNSHINE LAWS,
FROM "MOST OPEN" TO "LEAST OPEN"

Total Points

21	Tennessee
20	Florida
18	Alabama
17	Nevada
16	Montana Nebraska
14	Arkansas Oklahoma West Virginia
13	Alaska Arizona Illinois New Hampshire North Dakota Oregon Utah
12	Colorado Kansas Kentucky Michigan Minnesota New Mexico Virginia
11	California Indiana Iowa Louisiana Maine Missouri Ohio South Carolina
10	Connecticut Delaware Maryland New Jersey North Carolina Rhode Island Vermont
9	Georgia Hawaii

Massachusetts
Mississippi
New York
South Dakota
Texas
Washington

8 Idaho
Wisconsin
Wyoming

4 Pennsylvania